COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1735

ADOPTION OF LARK.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Department of Children and Families (department) filed this care and protection petition in July, 2013, and was granted temporary custody of the child, Lark. After a 2018 trial, a Juvenile Court judge found the mother unfit and terminated her parental rights. On appeal, the mother argues that the judge erred in (1) finding her unfit, (2) relying on Lark's attachment to the preadoptive parents, (3) not placing Lark in the care of the maternal grandmother, (4) declining to order postadoption visitation between Lark and the mother, and (5) not making findings regarding visitation between Lark and her older brother, Frank.[2] Both the department and Lark ask that we uphold the decree. We affirm.

[1] A pseudonym.

[2] A pseudonym.

Background. The mother and father[3] first came to the department's attention in 2010 when the mother gave birth to Frank and she and Frank both allegedly tested positive for opiates. The department obtained emergency custody of Frank and ultimately placed him with the maternal aunt, where he continued to reside at the time of trial. The mother's parental rights as to Frank were terminated in 2014.

When Lark was born in July, 2013, the mother tested positive for benzodiazepines and cocaine and Lark showed signs of withdrawal from suboxone. The department filed this petition and obtained emergency custody of Lark due to concerns about the mother's substance abuse and mental health. At the seventy-two hour hearing, Lark was returned to the custody of the mother and father, due in part to a determination that the mother's test result had been a false positive. The department remained concerned, however, because the father still had positive drug screens.

In August of 2014, police were called due to a domestic violence incident in which the father assaulted and pushed the mother, causing her visible injuries, while Lark was sleeping in her crib. The department once again took emergency custody of Lark and placed her with the maternal aunt, who was living with

[3] The father was also named in the current care and protection petition but passed away during the course of trial.

Lark's maternal grandmother. Eleven days later, both the maternal aunt and the maternal grandmother advised the department that they were unable to care for Lark and wanted her removed from their home that same day. The department then placed Lark with a foster family, which cared for Lark for two years. During that time, due to the mother's lack of cooperation with the department and noncompliance with her service plan, including the mother's inconsistent visitation with Lark, the department changed its goal for Lark from reunification to adoption. As the foster family was not interested in adopting her, Lark was placed in a preadoptive home in June 2016, where she remained and was thriving at the time of trial in early 2018.

The judge issued a fifty-eight page decision setting forth detailed findings of fact -- only two of which the mother challenges as clearly erroneous, see infra -- and conclusions of law. The judge concluded that the mother's "drug abuse, [her] unaddressed mental health issues, and domestic violence within the family caused neglect of [Lark] and [the mother] failed to follow service plan tasks, maintain a stable home life, or visit[] consistently with [Lark] to ameliorate these issues." The judge also concluded that the mother was unable to provide suitable housing for Lark. The judge found by clear and convincing evidence that the mother was unfit, that her

unfitness was likely to continue into the indefinite future to a near certitude, and that Lark's best interests would be served by terminating the mother's parental rights. The judge considered the mother's proposal to place Lark with the maternal grandmother, but concluded instead that Lark's best interests would be served by the department's permanency plan, providing for adoption of Lark by the preadoptive parents.

Discussion. It was the department's burden to prove by clear and convincing evidence that the mother was currently unfit to parent. See Adoption of Gregory, 434 Mass. 117, 126 (2001). "We give substantial deference to a judge's decision that termination of a parent's rights is in the best interest of the child, and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. 53, 59 (2011).

1. Unfitness. The mother argues that the judge erred in relying on various factors as indicating the mother's current unfitness.[4] We are not persuaded.

[4] The mother also points out that the judge made no findings about the mother's "parenting skills" and that the department's service plans did not require the mother to develop such skills. That neither the evidence at trial nor the judge's decision focused on "parenting skills" as a category, so labeled, hardly demonstrates the mother's fitness, given the numerous serious deficiencies and barriers to parenting found by the judge.

First, the mother challenges the judge's conclusion that she had not addressed her substance abuse issue. The mother's brief acknowledges that she "had a history of substance abuse, had not been consistently engaged in treatment programs, and refused to sign open releases regarding her treatment providers" as of 2014, but she asserts that from 2014 up to the time of trial, she had had no positive drug screens and her "sobriety should not be doubted." But the judge had ample basis for such doubts, finding that in the years prior to trial, the mother had not consistently engaged in substance abuse treatment, had not signed releases so that the department could obtain information about her sporadic involvement in such treatment, had injected drugs during that time, had refused random drug screens, and had not consistently engaged in scheduled drug screens -- the results of which were in any event unreliable because the mother controlled their timing and they were unsupervised. The mother challenges none of these findings.[5]

Next, the mother challenges the judge's conclusion that she had not addressed her mental health issues. The mother's principal argument is that she had been in therapy consistently

[5] Contrary to the mother's argument, the judge also identified the requisite nexus between her substance abuse issue and her inability, in several specified ways, to provide a stable and safe environment for Lark. See Adoption of Katharine, 42 Mass. App. Ct. 25, 32-33 (1997).

from June of 2017 until the time of trial in early 2018. But given the mother's longstanding and serious mental health difficulties,[6] predating Lark's birth, her sporadic participation in mental health treatment since the petition was filed, and particularly her refusal, even since June of 2017, to sign releases broad enough for the department to obtain important information about whatever treatment she was receiving, the judge's concerns were well-founded. As with the substance abuse issue, see note 5, supra, the judge found the requisite nexus between the mother's own mental health struggles and her inability to provide a safe, stable, and supportive environment for Lark. See Adoption of Quentin, 424 Mass. 882, 888-889 (1997).

The mother also asserts that the judge's stated concerns about domestic violence were "moot," apparently because the father had passed away during the trial. But, although the last known incident of domestic violence against the mother was perpetrated by the father in 2014, the mother continued to deny or minimize that incident. Moreover, the mother was the victim of domestic violence in a previous relationship, and at the time of trial the mother lived with her own father (Lark's maternal grandfather), against whom she had previously obtained a

[6] These include manic depression, bipolar disorder, posttraumatic stress disorder, and anxiety.

restraining order,[7] who had previously abused the maternal grandmother, and with whom the mother continued to have "deep conflicts." The judge found that the mother had completed an eight-week domestic violence support group in 2015 but that it was unclear if she had gained any insight from that program. The judge concluded that the mother's denial or minimization of her domestic violence experience, together with the risk created by her living with a domestic violence perpetrator (her own father), created concerns for Lark's safety and stability. The judge's concerns were well-supported and were not moot. See Custody of Vaughn, 422 Mass. 590, 595 (1996) (noting that child who witnesses domestic violence "suffers a distinctly grievous kind of harm").[8]

The mother next challenges the judge's conclusion that her inconsistent visitation with Lark supported the ultimate finding of unfitness. She acknowledges missing visits prior to April of 2017, and offers numerous reasons for having done so, but fails

[7] The mother contends that the judge's finding that the restraining order was in effect as recently as January of 2016 was clearly erroneous, and the department and Lark agree. Any such error does little to detract from the judge's conclusion that domestic violence remained an unaddressed and significant issue for the mother.

[8] Contrary to the mother's suggestion, that there were no tasks related to domestic violence on the mother's department-created service plan as of September of 2015 in no way barred the judge from considering the issue.

to acknowledge that the judge did not credit those reasons.[9] Indeed, the judge concluded that such failure to visit had been "willful," citing G. L. c. 210, § 3 (c) (x). The mother also asserts that from April of 2017 through the time of the trial, she maintained consistent monthly visits, which typically went well, but that the judge gave this factor insufficient weight. The judge was entitled, however, to give greater weight to the mother's long history of inconsistent visits than to her recent improvement.[10] The judge found that Lark had "become very sad" when the mother missed visits,[11] yet the mother "did not consider how [her inconsistent visitation] would affect [Lark's] emotional well-being." Recent improvements are not dispositive, particularly where not accompanied by increased insight into past shortcomings. See Adoption of Paula, 420 Mass. 716, 729-730 (1995).

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[9] The mother argues that the judge was biased in making credibility determinations, as to both the mother and other witnesses. "It [was] within the judge's discretion to evaluate the credibility of witnesses and to make [her] findings of fact accordingly. . . . [She] was not obliged to believe the mother's testimony or that of any other witness." Care & Protection of Three Minors, 392 Mass. 704, 711 (1984). We have considered the mother's few examples of assertedly biased credibility determinations, and they cause us no concern.

[10] See Adoption of Quentin, 424 Mass. at 886, quoting Custody of Eleanor, 414 Mass. 795, 799 (1993) ("the judge's assessment of the weight of the evidence . . . is entitled to deference").

[11] The judge found, and appropriately considered, that Lark "has been diagnosed with adjustment disorder, has trouble with transitions, and needs structure and consistency or she becomes easily dysregulated."

The mother asserts generally that the facts as found do not support the judge's conclusions that eight of the factors set forth in G. L. c. 210, § 3 (c), apply here. Based on the foregoing review of the mother's specific arguments, we see no basis to disturb the judge's conclusions or her ultimate finding that the mother was and "to a near certitude" would remain unfit.

2. Lark's attachment to preadoptive parents. The mother argues that the judge, in assessing the best interests of Lark, gave excessive weight to Lark's bond with the preadoptive parents and the emotional harm that would befall Lark were the mother to regain custody. See Adoption of Hugo, 428 Mass. 219, 230 (1998), cert. denied, 526 U.S. 1034 (1999) ("avoiding the trauma of separation [should not] be the determining factor for the judge"); Adoption of Rhona, 57 Mass. App. Ct. 479, 492 (2003).[12] The short answer is that the mother points to nothing in the judge's decision actually giving this factor any weight beyond what it is entitled to as one of the numerous statutory factors the judge is required to consider. G. L. c. 210, § 3 (c) (vii).

[12] Where avoiding such trauma becomes "a decisive factor," the judge must make particularized findings. See Adoption of Rhona, 57 Mass. App. Ct. at 492, citing Adoption of Katharine, 42 Mass. App. Ct. at 30-31.

In a similar vein, the mother suggests that the judge impermissibly engaged in a comparison of whether she or the preadoptive parents would be "better" parents for Lark, rather than focusing on whether the mother was capable of meeting Lark's needs. See Adoption of Abby, 62 Mass. App. Ct. 816, 828 & n.8 (2005). Again, however, the mother points to no specific language in the judge's decision hinting at any such comparison.

3. Proposed placement with Lark's maternal grandmother. The mother argues that the judge "erred as a matter of law in not placing [Lark] with her maternal grandmother." The mother asks us to "issue a rule that if an appropriate relative is nominated by a parent, that nomination should be given greater weight in determining the child's placement." But the Supreme Judicial Court has held that "a plan proposed by a parent is not entitled to any artificial weight in determining the best interests of the child" (quotation omitted). Adoption of Hugo, 428 Mass. at 226. We are bound by that ruling.

The mother also suggests that the judge failed to conduct the requisite "even handed assessment," Adoption of Hugo, 428 Mass. at 226 n.8, of her proposal for placing Lark with the maternal grandmother and the department's proposal for adoption by the preadoptive parents. Although the mother's brief cites cases and studies regarding the benefits of kinship placements, and cites evidence from trial suggesting that the department's

relationship with the maternal grandmother was antagonistic, the mother cites nothing at all suggesting that the judge did not fairly assess the two competing placement plans. To the contrary, the judge analyzed the proposed placement with the maternal grandmother at some length, and gave sound reasons why that placement would not be in Lark's best interests.

4. Postadoption visitation. The mother argues that the judge abused her discretion in deciding, based on the finding that "no significant bond exists" between Lark and the mother, not to order postadoption visitation between them. The mother relies on the recognition that "a child who is adopted following termination of his parents' rights may benefit from contact with his birth parents even if he did not earlier form a strong bond with them." Adoption of Rico, 453 Mass. 749, 759 (2009).[13] In Rico the court reiterated "the need to consider, in addition to bonding, 'other circumstances of the actual personal relationship of the child and the biological parent.'" Id., quoting Adoption of Vito, 431 Mass. 550, 562 (2000). But here

[13] The mother also suggests that the judge's finding of no significant bond was clearly erroneous in light of the preadoptive mother's testimony that the mother "has an important and irreplaceable role" in Lark's life. We are not persuaded. The preadoptive mother was not an expert on bonding, and the judge was not required to credit her opinion that the mother's role was "irreplaceable." The judge was also entitled to weigh the evidence of Lark's "demeanor during visits [with the mother] and her ability to disengage at the end of visits without any concern."

the mother fails to identify any specific circumstances of Lark's actual personal relationship with the mother that the judge failed adequately to consider. The mother's citation to scholarly articles on the topic is no substitute for such specifics and is insufficient to establish that the judge here abused her discretion. The judge reasonably determined to leave the question of postadoption visitation to the "sound discretion" of the adoptive parents, who are entitled to the presumption that they will act in Lark's best interests in this regard. See Adoption of Ilona, 459 Mass. at 64.

5. Sibling visitation. The mother's final argument is that the judge failed to make any findings regarding Lark's visitation with her older brother Frank. The mother asserts that the judge thus violated G. L. c. 119, § 26B (b), which provides, in pertinent part: "The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings . . . ."[14]

[14] The mother's brief erroneously relies on an older version of that statute, which established a role only for the court. The statute was amended in 2008 to give the department similar responsibility. See Adoption of Garret, 92 Mass. App. Ct. 664, 679–680 (2018). We note further that the mother's brief does not distinguish between posttermination and postadoption visitation. Language in G. L. c. 119, § 26B (b), suggests that that subsection applies to both time periods.

But the mother conceded at oral argument that she did not raise this issue in the trial court. Moreover, there is a significant question whether the mother, her rights now having been terminated, has standing to raise the issue. See Adoption of Zander, 83 Mass. App. Ct. 363, 367 n.6 (2013), citing G. L. c. 119, § 26B (c) ("[a] parent: (i) against whom a decree to dispense with consent to adoption has been entered . . . shall not have the rights provided under this section as to the child who is the subject of that decree or surrender"). In any event, there is nothing in the record concerning whether such visitation is in Lark's best interests, let alone the best interests of Frank, who is not a party to this case. See generally Care & Protection of Jamison, 467 Mass. 269, 284 (2014) ("the 'best interests of the child' standard does not establish a presumption in favor of sibling visitation"). Lark herself, in her brief, argues that the judge's action here was appropriate. Either child may later petition for such visitation, see Adoption of Garret, 92 Mass. App. Ct. 664, 680 n.25 (2018), and we also presume that Lark's adoptive parents will seek to establish such visitation if it is in Lark's best interests.[15] See Adoption of Ilona, 459 Mass. at 64. For all

[15] This is not a case like Adoption of Zander, where "[t]he judge acknowledged the necessity of sibling visitation, but left the timing and frequency of such visits to the discretion of the adoptive parents," and this court, "respectful of the judge's

these reasons, we decline the mother's request that we remand this case for the judge to make further findings regarding postadoption sibling visitation.

Decree affirmed.

By the Court (Kinder, Sacks & Shin, JJ.[16]),

Joseph F. Stanton

Clerk

Entered: October 30, 2019.

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determinations, . . . remand[ed] for the judge to provide a schedule for posttermination and postadoption sibling visitation." 83 Mass. App. Ct. at 367. Here, unlike in Adoption of Zander, the judge was not asked to and did not make any findings regarding whether such visitation was in Lark's best interests.

[16] The panelists are listed in order of seniority.